Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Digital Broadcast Content Protection	**)**	**MB Docket No. 02-230**
	)	

OPPOSITION OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC. TO THE PETITION FOR RECONSIDERATION OR CLARIFICATION FILED BY THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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INTRODUCTION AND SUMMARY

This opposition is in response to the Petition for Reconsideration or Clarification of the National Cable & Telecommunications Association ("NCTA"), filed in the above-captioned proceeding on January 2, 2004. In its Petition, the NCTA requests that the Commission add "successor [cable] [de]modulation schemes" to the list of Covered Demodulator Products, that it add QPSK and 8-PSK demodulators to the list of Covered Demodulator Products, and that the Commission "clarify" that Robust Methods may be used generally for home networks.

The Commission should reject all three of these requests. The addition of "successor modulation schemes" to the regulation would create unnecessary confusion and add to the Commission's enforcement burden. Similarly, there is no need to add QPSK and 8-PSK demodulators to the regulation, since the regulation correctly draws a distinction between encrypted retransmission such as that used by satellite providers and unencrypted retransmission such as that currently used by cable operators. Unencrypted retransmission should be kept to a minimum. Finally, the Commission should reject NCTA's proposed "clarification" to allow Robust Method transfers, which would largely eliminate the need for Table A and would eviscerate the regulation's protections for digital broadcast content.

I. The Commission Should Not Add to the Legacy of Unencrypted Retransmission of Broadcast Content, But Rather Should Require Future Modulation Schemes to Retransmit Broadcast Content in Encrypted Form

NCTA proposes that the definition of Covered Demodulator to include, in addition to 8-VSB, 16-VSB, 64-QAM, and 256-QAM demodulation schemes, "successor modulation schemes," and to alter Section 76.1909 to allow digital broadcast content retransmitted via such "successor modulation schemes" to be retransmitted in the clear. NCTA asserts that this change is necessary in order to permit cable operators to use 1024-QAM modulation without pursuing a rulemaking or waiver.

NCTA's proposal would take an existing legacy situation of in-the-clear retransmission and extend it indefinitely into the future. By contrast, the philosophy of the Broadcast Flag regulation is to make accommodations for unprotected signals only where an existing legacy situation exists in the marketplace. Existing cable-compatible televisions and other devices are built to receive the basic tier, included retransmitted broadcasts, in the clear. However, that does not mean that all future cable-compatible devices should be permitted to receive digital broadcast television content in the clear. Instead, the Commission should encourage a transition to protected content by clarifying in the Further Notice of Proposed Rulemaking in this proceeding that it is removing the prohibition against cable and satellite retransmitters' encrypting the basic tier.

NCTA's proposed amendment to the rule would unnecessarily broaden the Commission's enforcement burdens and add confusion for manufacturers as to what devices are covered by the rule. For example, assume a manufacturer makes products containing demodulators of some type other than 8-VSB, 16-VSB, 64-QAM, or 256-QAM. In designing its products, the manufacturer would face the risk that a few months into the product's lifespan, the demodulator in its product would be used as a "successor modulation scheme" by cable operators and

therefore be required to be compliant with the regulation. The Commission would in turn be required to ensure compliance by such manufacturers each time such a modulation scheme was adopted by cable operators. Instead, a preferable solution is to require DTV content retransmitted by future modulation schemes to be encrypted, thus eliminating any regulatory uncertainty and unpredictable shifts in enforcement burdens.

II. There Is No Need for the Regulation to Cover QPSK or 8-PSK Demodulator Products

Claiming that the Broadcast Flag regulation imposes a greater burden on the cable industry than the satellite industry, NCTA proposes that the Commission add QPSK and 8-PSK demodulators as Covered Demodulators subject to the regulation. In fact, the regulation imposes no greater burdens on the cable industry than on the satellite industry. The only distinction drawn in the regulation between retransmitters is between encrypted retransmission and unencrypted retransmission, not between cable and satellite. And even that distinction will evaporate once cable operators retransmit digital broadcast content in encrypted form; once such retransmission has become standard practice, the Commission will be able to eliminate Section 76.1909(c) altogether. Until that time, however, Section 76.1909(c) is necessary as a narrow accommodation of an existing legacy situation.

Treating encrypted and unencrypted retransmission differently is consistent with the rest of the Broadcast Flag regulation, which achieves the protection of digital broadcast television content while preserving maximum flexibility for technology providers, consumer electronics ("CE") manufacturers, and distributors such as cable operators and satellite providers. The Broadcast Flag regulation ensures compliance by regulation where necessary, but allows private solutions where they would be effective. Where a retransmitted signal is encrypted, protection can be easily achieved by requiring private solutions. As is done with "Table A" authorized

protection technologies for permitted outputs and recordings in a compliant device, the Broadcast Flag regulation requires that retransmitters that encrypt the signal include in their decryption licenses a condition that the decrypting device must adhere to the Flag regulation's compliance and robustness rules.[1] In order to ensure that protection on decryption is appropriately triggered, such retransmitters have an obligation to check for the Flag before encrypting the signal. To meet its obligations under the regulation, the retransmitter must require the receiving device manufacturer to sign a decryption license obligating the receiving device to protect Marked Content upon decryption, similar to a license for a Table A technology that manufacturers of non-demodulating sink devices must sign. Thus, for retransmitters that use encryption, the construction, behavior, and operation of the receiving device will be regulated by the Commission; and it will be the retransmitter, rather than the manufacturer of the receiving device, that is directly liable for any violations.

Because not all retransmitters encrypt retransmitted digital broadcast content, however, the rule contained in Section 76.1909(b) had to be supplemented with a rule that applied in the case of unencrypted retransmission. Unencrypted retransmission requires regulation of the receiving device to ensure compliance, since the retransmitter has no necessary relationship with the device manufacturer. Under the Broadcast Flag regulation, therefore, unencrypted retransmission must use one of a limited number of specified modulation schemes, and demodulators of those specified types are defined as Covered Products subject to the regulation.[2] Thus, whereas retransmitters that encrypt are directly subject to Commission regulation, and are ultimately responsible for the compliance of the consumer's product with the regulations,

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1 *See* 47 C.F.R. § 76.1909(b).

2 *See* 47 C.F.R. § 76.1909(c); *id.* § 73.9000(g).

retransmitters that choose not to encrypt are not responsible for the compliance of the consumer's receiving device, so long as they preserve the Flag and use one of the specified modulation schemes. It is arguable which type of retransmitter bears a greater burden under the regulation.

The regulation specifies that only a few permitted modulation schemes may be used for unencrypted retransmission in order to limit the sweep of the regulation, as well as to ease the enforcement burden on the Commission and on content owners. The regulation should not cover all forms of demodulation, for that would make NTSC demodulators, AM/FM radio demodulators, modems, faxes, cell phones, and other products "Covered Products" that would have to check for the Broadcast Flag. Nor is it feasible to list all of the forms of demodulation that could possibly be used by retransmitters of broadcast DTV content. As the MPAA and others stated in our initial comments, some retransmitters "use a variety of changing modulation methods not readily specified in the Requirements."[3] Thus, the regulation as adopted, which permits a wide range of modulation schemes so long as the retransmission is encrypted, is the optimal solution. If the regulation required all retransmitters to use only certain modulation schemes, it would unnecessarily limit retransmitter flexibility. On the other hand, if the regulation failed to specifically identify the modulation schemes that could be used for unencrypted retransmission, it would create a potential loophole unless the list of covered demodulators was extremely broad.

At the moment, only satellite providers encrypt retransmitted broadcast content. However, the Commission has expressly requested comment in its Further Notice of Proposed Rulemaking on the issue of whether the general prohibition on encryption of broadcast content

[3] Joint Initial Comments of the MPAA, et al., at 19.

by cable MVPDs should be lifted or applied to digital services. Therefore, any distinction between the two industries based on encryption of retransmitted broadcast content may disappear. There is thus no need to broaden the definition of Covered Products and increase the number of distributors that may retransmit digital broadcast content in the clear.

III. There Is No Broad Exception in the Regulation for the Use of Robust Method Transfers in Home Networks

NCTA requests that the Commission "clarify" that Marked Content and Unscreened Content may be transported around a home network via Robust Methods pursuant to Sections 73.9003(a)(5) and 73.9004(a)(4). As an example, NCTA requests that "a multi-room DVR" be permitted under those two provisions to "control and send the display to another room via Robust Methods."[4] Far from being a "clarification," however, such a change would drastically alter the regulation and eliminate many of the protections the regulation affords digital broadcast content.

NCTA's requested clarification is based on a wishful reading of Sections 73.9003(a)(5) and 73.9004(a)(4). Those two sections permit an output from a Covered Demodulator Product where the content is output "to another product and such Covered Demodulator Product exercises sole control (such as by using a cryptographic protocol), in compliance with the Demodulator Robustness Requirements, over the access to such content in usable form in such other product." This was intended to be a very limited exception for a narrow and particular product configuration. It was never the intent of the drafters of the proposed Compliance Rules in the Broadcast Protection Discussion Group that the "sole control" allow Robust Method transfers generally around a home network, or to permit a client-server environment as described

[4] NCTA Petition at 6.

by NCTA. The foremost difficulty in NCTA's reading of the "sole control" provisions is that it fails to give a reasonable definition of sole control. The concept of "sole control" does not mean that the consumer only has a single remote control, which he or she uses to send content throughout the home network. Rather, the concept of "sole control" refers to the number of devices that can access the content in usable form. If the receiving device is able to decrypt the content, that is not "sole control," as the receiving device can then access, record, or output the content in usable form – i.e., it can itself control the content – once it has been decrypted.

The intent of the "sole control" provisions was to permit an output to peripheral devices that, for all practical purposes, may as well be within the Covered Demodulator Product itself. Transfers within a Covered Demodulator Product are obviously under that product's control, and must comply with the Robustness Requirements. Similarly, an output to, for example, a passive peripheral storage unit device connected to the product by a USB cable should be permitted, so long as the content is still under the control of the Covered Demodulator Product and the movement and handling of the content complies with the Robustness Requirements, just as if the content were moving within the Covered Demodulator Product only. It was intended that, in order to remain within the "sole control" of the sending Covered Demodulator Product, the receiving device in such a situation would have no outputs for the content other than outputs back to the sending Covered Demodulator Product. While outputs for purposes of recording pursuant to an Authorized Recording Method are allowed under a different exception, the "sole control" exception would allow outputs to a peripheral storage device that made a bound recording pursuant to Sections 73.9003(b)(1) or 73.9004(b)(1).

Despite what NCTA claims,[5] there was never any understanding in the Broadcast

[5] NCTA Petitions at 8.

Protection Discussion Group that Robust Method transfers could be used generally around a home network. The BPDG Report makes clear that "a self-certified 'Robust Method'" could be used "for outputs only where the DTV content was unaltered Unscreened Content (e.g., Unscreened Content that had not yet been transport stream processed)."[6] Thus, the intent was clearly to keep self-certification to a very limited number of situations, and to rely on Table A technologies for the protection of outputs and recordings, including those used in a home networking context.

NCTA's interpretation of the "sole control" provisions would have absurd consequences for the rest of the regulation. It would make Table A superfluous. If content could flow freely around a home network using self-certified protection technologies, there would be no need for anyone to use a Table A technology. Nor would there have been any need for the Commission and the parties before it to have spent innumerable hours considering the precise form of Table A. NCTA appears to be alone in its conclusion that the time has been invested in discussing the Table A criteria and the process by which technologies are to be added and removed has been completely unnecessary.

In any event, it is difficult to see how NCTA's overly broad interpretation of Sections 73.9003(a)(5) and 73.9004(a)(4) would benefit even cable operators. NCTA's petition states that its proposed change to the rules would allow cable operators to "use various forms of encryption, conditional access, and other security tools to carry marked content from one device in the home

[6] Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup to the Copy Protection Technical Working Group ¶ 5.4 (June 3, 2002). The Broadcast Flag regulation as adopted by the Commission collapses the difference that once existed between the Robustness Rules and Robust Method transfers. The former contained a number of specific requirements that the latter did not. The point here is merely that the use of a different term than "Robust Methods" in the "sole control" provisions indicates that something other than the use of self-certified output protection technologies for home networks was envisioned.

to another so long as the home network itself used secure interfaces between the devices."[7] The cable industry's particular interest in this scheme would seem to be to use conditional access systems as a home networking technology. However, the continued use of a cable operator's proprietary conditional access systems within a home network would seem to be inconsistent with the Commission's determination that portable navigation devices be readily available at retail. It is thus not even clear that the proponents of the broad definition of "sole control" would be able to reap the benefits of such a change.

The Commission should therefore clarify that the "sole control" provisions do not allow use of Robust Method transfers as home networking technologies, but rather allow only robustly protected outputs to passive, peripheral devices such as storage units protected with a recording method permitted under Section 73.9003(b)(1) or Section 73.9004(b)(1). To eliminate doubt, the MPAA proposes that the Commission add the following definition of "sole control" to the regulation:

> A product shall have "sole control" over content sent from that product to another product if and only if (a) the sending product alone controls the content in such other product, including exclusive control of the transmission of the content to and from the receiving product only, the encryption and decryption of the content, the compression and decompression of the content, and the recording of the content; and (b) the receiving product has no outputs for the content other than outputs to the sending product.

CONCLUSION

NCTA has not provided any substantial reason to alter the Broadcast Flag regulation. Moreover, its proposed changes would seriously weaken the regulation. The Commission should reject NCTA's petition.

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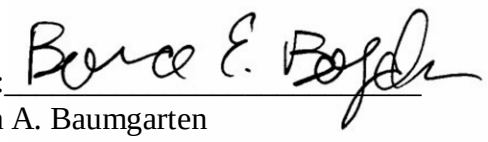
[7] NCTA Petition at 9-10.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

By: 

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CERTIFICATE OF SERVICE

I, Bruce E. Boyden, hereby certify that a true and correct copy of the Opposition of the Motion Picture Association of America, Inc. to the Petition for Reconsideration or Clarification Filed by the National Cable & Telecommunications Association was served on the following parties on March 10, 2004, by first-class mail, postage prepaid:

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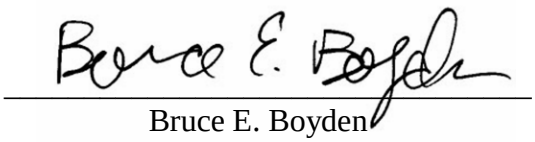

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